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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 367

MORRIS MALINSKI and SIDNEY RUDISH,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

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RESPONDENTS' BRIEF.

Opinions Below.

The petitioners were convicted of murder in the first degree in the County Court of Kings County, State of New York, after a trial which lasted eleven days, and were thereafter sentenced to the death penalty. On appeal to the Court of Appeals, the highest court of the State, the judgments were affirmed by a divided vote of four to three. The majority and minority opinions of the court are reported officially in 292 N. Y. 360 (R. 1479-1503). Motions to amend the remittitur were granted with an opinion

reported officially in 292 N. Y. 686 (R. 1506-1507), and thereafter motions for reargument of the appeal were denied without opinion (293 N. Y. 695; R. 1567).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended [28 U. S. C. A. Sec. 344 (b)], upon the claim that petitioners were denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The precise character of the Federal rights specially set up and claimed in the Court of Appeals is set forth in the court's opinion amending the remittitur which, in its pertinent parts, reads as follows (292 N. Y. 686; R. 1506-1507):

> "Questions under the constitution of the United States were presented and necessarily passed upon.
>
> "The defendant Rudish contended that the admission of the confession of his co-defendant Malinski in evidence against Malinski was a denial to the defendant Rudish of due process under the Fourteenth Amendment to the constitution of the United States.
>
> "The defendant Malinski contended that the admission in evidence of his alleged confession and his identification of the 'murder car' and his description of the events at the scene of the murder violated his rights under the Fourteenth Amendment to the constitution of the United States.
>
> "This court held that the rights of neither defendant under the Fourteenth Amendment to the constitution of the United States had been violated or denied. (See 292 N. Y. 360.)"

Questions Presented.

The petitioners raise the following questions (Petitioners' Brief, p. 3):

> (a) Whether "the circumstances under which a confession was obtained from Malinski and put in evi-

dence" constitute a denial of due process of law in violation of the Federal Constitution.[1]

(b) Whether "the conduct of the prosecuting attorney and his summation to the jury constitute such a violation of the fundamental concepts essential to a fair and impartial trial" as to be a denial of due process of law.

(c) Whether "the conduct of the judge, his charge, and his failure to charge fully and intelligently on certain phases of the case" constitute a denial of due process of law.

Statement of the Case.

At about eleven o'clock on the night of February 15, 1941, Leon Fox, a police officer of the City of New York, was shot and died shortly thereafter as a result of bullet wounds. At the time of the shooting the police officer, in the course of his duties, was accompanying the manager of a moving picture theatre who was carrying the day's receipts to a bank.

The testimony of the manager shows that, as he and the police officer were walking toward the bank, a man jumped out of an automobile which was parked at the curb, struck the manager and shot the officer. The manager attempted to flee with the bag containing the money, but he threw it away when the man who had shot the officer said: "Drop the bag, or I'll drop you." The robber then picked it up, jumped back into the car, and the car sped away. The police officer, as he lay upon the sidewalk, fired about six shots in the direction of the departing car (R. 127-147).

In about an hour an abandoned car with a cloth top (R. 136, 142, 189-190) and a bullet hole in one of its

[1] It should be noted, in passing, that no confession was made by Rudish to any public official, that the trial court, in receiving Malinski's confession in evidence, carefully instructed the jury that it was to be considered against Malinski alone (R. 618-620), that counsel for Rudish expressly approved the instructions (R. 620) and at the close of the People's case rejected an offer by the court to grant Rudish a separate trial (R. 767-769).

fenders (R. 161, 174) was discovered a short distance away from the scene of the crime. It was identified by several eye-witnesses as the car used by the men who committed the murder (R. 133, 136, 142-143, 151, 189-192). Between its front wheels there was also found a brown fedora hat (R. 176-177). Investigation further disclosed that the car had been stolen about two hours before the crime was committed (R. 207-213).

No eye-witness was able to identify the men who took part in the crime. One of them, however, did say that after hearing five or seven shots his attention was attracted by a fleeing car in which he saw three men, two of them in the front and the third in the back with his head "bent over" (R. 194-196).

Aside from Malinski's confession to the district attorney and the police, which we shall discuss hereafter, the evidence established that Malinski and Rudish and one Abraham Beitler were the participants in the murder. One Joseph Indovino was also involved as the so-called "tipster" (R. 298) to the robbery, but he did not go to the scene of the crime because he was too well known in that neighborhood (R. 227-230).[2]

In November, 1942, Malinski, Rudish and Indovino were indicted for the murder.[3] They were tried jointly and all three were found guilty as charged.[4]

[2] Another individual, David Yellin, who aided in the preparation of the crime, testified for the People and was held to be an accomplice as a matter of law (R. 1347).

[3] Beitler was not indicted because in October, 1941, he, while engaged in an affray in a New York hotel, shot a man, attempted to shoot a policeman and then committed suicide (R. 714-716).

[4] As to Indovino, however, the jury recommended life imprisonment (R. 1417) which recommendation was followed by the trial court. Since there is no direct appeal to the Court of Appeals except where the penalty is death (N. Y. Code Crim. Proc., sec. 517), his appeal was brought to the Appellate Division of the Supreme Court, Second Judicial Department, where it was argued on November 6, 1944. No decision has yet been rendered.

Evidence Apart From Malinski's Confession to the District Attorney and the Police.[5]

To evaluate the evidence in true perspective it will help if we first note the background of two of the People's witnesses and their relationship to the petitioners.

In December, 1941, Nathan Spielfogel, also referred to as "Slip", and David Yellin were sentenced to State prison for robbery committed while armed. Yellin received a sentence of ten to twenty years (R. 221, 246). Spielfogel, being a second felony offender, received a sentence of thirty to sixty years (R. 295).

Yellin and Rudish knew each other for twelve to fifteen years (R. 222) and were "very close friends" (R. 282). Spielfogel was the friend of Malinski for about six years (R. 296, 962). "As an outgrowth of his intimacy with Malinski and of their criminality together, he and Malinski had agreed that if one went to prison the other would contribute to the support of the family of the one incarcerated. Malinski broke that agreement after partial performance of it" (Conway, J., 292 N. Y. 360, 365; R. 375-376).

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[5] At the trial Malinski repeatedly asserted that his confession to the district attorney and the police was false (R. 554, 955, 956, 960, 961, 967, 968) and in his brief to this Court (p. 10) he again emphasizes that testimony. At page 14 of his brief, however, he urges that "Whether the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over the defendant's objection. If such admission of this confession denied a constitutional right to defendant the error requires reversal." We shall later show that, apart from the other evidence in the case, the Court of Appeals was amply justified in rejecting the contention that the use of Malinski's confession was a denial of due process of law. At this point it suffices to note that "Asserted denial (of due process of law) is to be tested by an appraisal of the totality of facts in a given case" (*Betts* v. *Brady*, 316 U. S. 455, 462). It follows, therefore, that a consideration of the other evidence in the case is material to the question presented for review.

Both Spielfogel and Yellin were serving their terms when the district attorney was informed that they knew who had killed the police officer (R. 1493). Neither one of them was given any promise or even intimation that anything would be done to lessen their sentences or to reward them in any other way for becoming witnesses for the People (R. 264, 275, 373, 401-402). And both of them testified that they would not commit perjury where men's lives were at stake (R. 264-265, 373).

(a) Malinski's disclosures to Spielfogel.

Spielfogel testified that about 1:30 o'clock on the morning of February 16th, which was about two and one half hours after officer Fox was shot, Malinski came to Spielfogel's home without hat or coat, his hair "all thrown apart like a wild man", and said to Spielfogel: "We had a shooting match. I want to talk to you" (R. 302-304). Spielfogel then supplied Malinski with a hat and accompanied him to a nearby club. In response to Spielfogel's inquiry as to what had happened to Malinski's hat and coat, Malinski replied: "I got a coat over in the club but the hat, it is Hershee's hat. I dropped it on the hoist (which means a robbery) after I jumped out of the car" (R. 304).[6]

At the club, where they stayed for about half an hour, Malinski related how the crime was committed. He told Spielfogel that he, Rudish and Beitler drove to Coney Island where, after visiting a restaurant, they placed the automobile near the bank; that Beitler stayed on the corner and gave him a signal when the manager and the police officer were approaching; that he (Malinski) then got out

[6] It will be recalled that a hat was found under the abandoned automobile used in the robbery (R. 176-177). "The hat so found, later initialed by Malinski during a confession to which reference will be made, fitted Malinski when he was required to put it on while testifying or the jury could so have found" (Conway, J., 292 N. Y. 360, 367).

of the car and said to the cop "this is a hoist"; that the cop went for his gun, whereupon Malinski "pegged a few" and jumped into the rear of the car; that after Beitler got in they drove away, Rudish driving the car; and that they later abandoned the car and came to the club where the money was divided (R. 307-308, 310).

Malinski also disclosed that at the time of the division of the money they had a dispute as to the conduct of the robbery, Malinski insisting to Spielfogel that "I done everything I was supposed to do", that Beitler was supposed to to take the money while he (Malinski) "took the cop", but that Rudish and Beitler argued that it had been arranged for Malinski to take the money (R. 309).

In the course of that conversation as detailed by Spielfogel from the witness stand, Malinski said that he had used the "pieces" (guns) which Red Tiplet had taken from a locker uptown (R. 310); that "We used two .38's side throwers and two .45 automaties" (R. 311); and that he and Beitler each fired two shots (R. 333).

(b) Corroboration of Spielfogel by independent evidence.

Red Tiplet, referred to by Spielfogel, was the nickname of Simon Eisler whose testimony appears at pages 447-470 of the Record. The significance of his testimony is described by Judge Conway as follows (292 N. Y. 360, 367-368):

> "* * * bearing in mind that this story was told by Spielfogel in October of 1942 (he was brought to the city from Sing Sing on October 15, 1942), nearly twenty months after the commission of the crime, it is interesting to note that the District Attorney brought to the trial one Eimon Eisler who, at the time of the trial, was a corporal in the United States Army stationed at Tacoma in the State of Washington and who had never been convicted of any crime nor charged with any crime. The testimony of that man as distinguished from that of the convicts who

gave testimony against Malinski undoubtedly had great weight with the jury and was very damaging to Malinski. Eisler's nickname was Red Tiplet (a red pigeon). When he gave his testimony he had been in the Army since January 20, 1941, a period of about two and one half years. He entered the Army therefore about twenty-five days before the murder. He had known the defendant Rudish for fifteen years and the defendant Malinski for about three years. He testified that in the latter part of December, 1940, he had a talk with Malinski at the Citadel Club and that Malinski gave him a ticket to pick up a package in the Terminal and to bring it down to the club. Malinski gave him four dollars and he went uptown, picked the package up and brought it back to the club. Malinski opened it and in the package he saw four pistols: two fountain pen guns and two pistols of .38 calibre. The two .38 calibre pistols were wrapped in stockings. He was asked: 'Q. In addition to the fountain pen guns and the two .38's, did you see any other object in the package? A. There were more stockings but I don't know what was in them.' The corporal said that when he obtained the package he had not known what was in it. * * * Curiously enough the witness had never told Spielfogel nor Yellin nor any police officer about the errand on which Malinski had sent him until he was brought from Tacoma on June 12, 1943, a distance of 3,000 miles, five days before he testified on June 17, 1943. It would seem clear that the information as to Eisler could only have come to the District Attorney from Malinski through Spielfogel * * *."

(c) Additional corroboration by evidence from Malinski's brother-in-law and girl friend.

Spielfogel testified that after staying in the club for about half an hour in the early morning of February 16th he accompanied Malinski to the home of Malinski's sister

where Malinski wanted to stay for the rest of the night (R. 344, 348); that he entered the kitchen of the apartment, took a drink of water, and then walked back into the hall where he heard Malinski say to somebody: "Go back to bed" (R. 352-353).

Here again, the People put on the witness stand Malinski's brother-in-law and a young woman in whom Malinski was interested and who was living at that time with Malinski's sister and husband. The brother-in-law testified that about 1:30 or 2 o'clock in the morning of Sunday, February 16, 1941, he was aroused by a loud knock on the door; that when his wife opened the door he saw Malinski and heard him say he had shot a cop in Coney Island and had $200.00 in his pocket (R. 524-526). The brother-in-law further stated that Malinski then spoke to the young woman who was living in the apartment and heard Malinski say: "If you don't go back to bed there I give you the same dose as I gave the cops" (R. 527). Thereupon the brother-in-law ordered Malinski to leave the house (R. 527-528).

The woman testified that in the early hours of the Sunday morning in question she, too, was awakened by a banging on the door and heard Malinski ask his sister whether he could stay there for the night; that when the sister replied there was no room, he said: "We just shot a cop. We each got $200 apiece" (R. 489-490). The young woman then went into the kitchen and asked Malinski: "What did you do, shoot a cop?", to which he responded: "Get back in bed before I give you the same thing I gave the cop" (R. 490).

Malinski's sister was not called to deny any part of the foregoing testimony (R. 1484).

Malinski's Confession to the District Attorney and the Surrounding Circumstances.

Malinski had previously been convicted for attempted robbery for which he served a term of imprisonment from May 1937 to January 1940 (R. 945-946).

About a day or two after his associate Spielfogel disclosed the information heretofore related, Malinski was arrested (R. 369).[7] The arrest was made at 7:30 o'clock in the morning of Friday, October 23, 1942 (R. 552, 573) by two police officers who took Malinski to a room in the Bossert Hotel, "a leading hotel in Brooklyn" (R. 1480). Shortly thereafter Spielfogel was brought to the same place (R. 577, 950).

The police, however, did not arraign Malinski until the morning of Tuesday, October 27th (R. 553, 573),[8] which was about eight hours after Malinski made a full and detailed confession to the district attorney. This confession was recorded by a stenographer and appears at pages 621-639 of the Record.

When the confession was offered in evidence objection was made to it upon the ground that it was involuntary. The trial court, in accordance with New York procedure, then held a preliminary hearing and took testimony both for the prosecution and for the defense (R. 547-616). There being a conflict in the evidence both as to threats and the

[7] The arrest was lawful. "A peace officer may, without a warrant, arrest a person when a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it" (N. Y. Code Crim. Proc., sec. 177, subd. 3).

[8] "The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night" (N. Y. Code Crim. Proc., sec. 165). And a police officer "who wilfully and wrongfully delays to take such person before a magistrate" is guilty of a misdemeanor (N. Y. Penal Law, sec. 1844). The failure to arraign Malinski promptly was explained by Lieutenant McNally, who was in charge of the investigation, as follows: "He liked the Hotel Bossert in preference to a station house cell. I asked him if he wanted to be booked on Friday, or would he rather stay at the Hotel Bossert with his friend Slip (Spielfogel). So he chose Slip and the Bossert" (R. 580-581). The record also shows that although Spielfogel did not sleep at the hotel, he was brought there every morning (R. 581, 956).

use of violence, the court admitted the confession (R. 617).[9] Thereafter Malinski reiterated his testimony when he again took the witness stand in his defense (R. 948-961). Further contradictory evidence was offered by the People (R. 1108-1123), and the court submitted the question as to the voluntary character of the confession to the jury under instructions which were approved by the Court of Appeals (292 N. Y. 360, 371, 374-375).

On the question of arraignment without unnecessary delay the court charged as follows (R. 1376-1377):

> "Lieutenant McNally claims that he was willing to arraign Malinski before a Magistrate on the very day, namely, Friday, when Malinski was first brought to the Bossert, but that Malinski stated that he would rather stay at the hotel with his friend Spiegel than be thrown into a cell in a police station.
>
> Be that as it may, I charge you that it was the duty of the police to arraign the defendant before the nearest Magistrate without unnecessary delay, and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.
>
> But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession if made. If you should find

[9] "A confession of a defendant * * * can be given in evidence against him, unless made under the influence of fear produced by threats, * * * " (N. Y. Code Crim. Proc., sec. 395). "Delay in arraignment does not exclude a confession." (*People* v. *Trybus*, 219 N. Y. 183.) Neither does the fact that officers of the law questioned the defendant persistently in regard to his connection with the crime (*People* v. *Rogers*, 192 N. Y. 331, p. 348), nor that they failed to warn him of his privileges or rights" (*People* v. *Doran*, 246 N. Y. 409, 423). "Only where the confession is made under the influence of fear produced by threats is it inadmissible" (*People* v. *Mummiani*, 258 N. Y. 394, 398).

that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinski, including the one made in the early hours of October 27th at the Bath Beach station house."

With respect to the stenographically transcribed confession the court said (R. 1380-1381):

"Although Malinski does not deny that he made this confession, his contentions are:

That the confession is valueless as evidence against him because it was made by him due to force and intimidation and fear visited upon him by the police authorities, and implied coercion because of the manner in which they kept him in custody from the time of his apprehension until he made this confession. You must find beyond a reasonable doubt that this confession was a voluntary one before you would have the right to consider it.

Malinski then urges a second objection to this confession. His claim is that the statements contained in this confession implicating him in this crime are untrue.

Under the law, therefore, you will determine, first whether or not this confession is voluntary. If you find it was involuntarily made, or if you have a reasonable doubt about it, then you will disregard the confession entirely. On the other hand, if you find beyond a reasonable doubt that the confession is a voluntary one, you will then determine whether or not the statements inculpating the defendant, therein contained, are true. If you shall have resolved both of these questions in favor of the prosecution, then and only then will you consider the confession in determining the guilt or innocence of the defendant of the crime of murder in the first degree."

Since the determination by the trial court and the jury, approved by the highest court of the State, will be accepted

by this Court where the evidence is in conflict,[10] "or where different inferences may fairly be drawn from admitted facts",[11] it is essential to draw a sharp line between the disputed and undisputed facts.

(a) The disputed facts.

Malinski claimed that on Friday, October 23rd, at the Bossert Hotel, he was forced to strip, and that after he protested his innocence, the police beat him severely and threatened to throw him out of a six-story window, in order to extort a confession from him. He charged that several of the detectives beat him with their fists and struck him across his face, head, back and other parts of his body (R. 549, 551, 555-561, 567-568). His version of a conversation he had with Spielfogel on that day was that when the police granted his request to speak to Spielfogel (R. 566) he and Spielfogel went into the closet of another room where Spielfogel told him, in substance, that if he wanted to save himself from a beating, he had better tell the police what the police would like him to say, that he (Spielfogel) knew he was innocent, but that under the circumstances it was the best course to pursue (R. 565-566, 951-952). He then testified that, in order to save himself from a terrific beating, and with the aid of Spielfogel who in Yiddish related to him the details of the crime, he finally made an oral confession to the police late that evening (R. 565-566, 553-554) and told them "Whatever Spielfogel told me to say" (R. 952).[12]

[10] *Lisenba* v. *California*, 314 U. S. 219, 238.

[11] *Lyons* v. *Oklahoma*, Law. Ed. Advance Opinions, vol. 88—No. 16, p. 1070, 1079, decided June 5, 1944.

[12] The details of that oral confession were never offered in evidence. As stated in petitioners' brief (p. 20), "No attempt was made to prove the details—to show what he said." And we also agree with petitioners' statement in their brief (p. 13) that "It is the confession taken on October 27th, by a stenographer at 2:10 A. M. at the Bath Beach station house and his identification of the murder car and his description at the scene of the murder with which this Court alone is concerned."

The testimony of the police and Spielfogel, on the other hand, is in direct conflict with Malinski's accusations. Although the police frankly admitted that Malinski was stripped, they denied that force was used. Malinski, they testified, removed his clothes pursuant to their request (587, 605), and the reason for the request was as follows: "we did not know whether any of the men in connection with the Fox case had been shot, so I had him stripped. I had him strip himself for that purpose. * * * To see if he had any bullet wounds * * * bullet scars" (R. 584).[13] It should also be noted that Malinski admitted that after he was stripped the police "looked all over" his body (R. 564).

In addition, the police emphatically denied the use of force or threats against Malinski at any time from the moment of his arrest until his arraignment on October 27th (R. 572, 592-593, 596, 603-605, 611, 613-614).

We now turn to Malinski's testimony that all of the information he gave to the police and to the district attorney was the result of the advice he received from Spielfogel and that none of this information came from personal knowledge or experience (R. 951-952, 955-957, 961, 987). In this respect the testimony of Malinski's brother-in-law (R. 526-528), of the young woman in whom he was interested (R. 489-490), of Simon Eisler (R. 447-470) and of Spielfogel (R. 302-311, 333)—which disclosed Malinski's incriminating conduct and admissions shortly before and immediately after the murder—conclusively blocked Malinski's attempt to exculpate himself from any participation in the crime. In addition, Spielfogel specifically denied that he ever spoke Jewish to Malinski or that he ever told him what to say (R. 1108). Spielfogel also contradicted the

[13] "The stripping of Malinski for that purpose was concededly proper", particularly in view of the fact that officer Fox had fired several shots in the direction of the fleeing automobile and that at least one shot had struck the car (Conway, J., 292 N. Y. 360, 372). Insofar as the prosecuting attorney's improper remarks on this point in his summation to the jury are concerned, we say that they are indefensible; we shall discuss them later.

"closet" conversation as related by Malinski. He testified that sometime during the afternoon of Friday, October 23rd, Malinski asked for permission to talk to him. When the request was granted they went into another room (R. 322, 390) where the following conversation took place (R. 322):

> *Malinski:* "Listen, Slip, I know they got Jake in the other room otherwise they cannot know so much. They know too much already. I might as well go out there and tell them the rest and get it over with."
>
> *Spielfogel:* "Well, you are over 21. You know what the score is; do what you want."

Thereupon, according to Spielfogel, Malinski and the police lieutenant had the following discussion (R. 322-323):

> *Malinski:* "I will tell the truth, but I don't want to go to the chair for this."
>
> *Lieutenant:* "I cannot promise you anything. This is a police case. You will have to take your chance. Whatever happens, happens."
>
> *Malinski:* "I would like to bring a rabbi in or a fellow by the name of Nat Math.[11] I would like to talk to him before I say anything."
>
> *Lieutenant:* "This is my case. You have got to take your chances."

Thereafter, said Spielfogel, Malinski "started to tell everything" (R. 323).

In an attempt to bolster his accusation of police brutality Malinski testified on cross-examination that he asked for a doctor on Saturday, October 24th, and that his request was denied (R. 562). He stated that on the preceding day, when he was allegedly beaten, he did not feel that he needed

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[11] Nat Math was then an assistant district attorney of Kings County (R. 1486).

medical attention (R. 563). Further cross-examination, however, elicited the answer: "I didn't have no injuries" (R. 563). Why then did he ask for a doctor? His reason was as follows (R. 562):

> "I was sick. I didn't do nothing and I couldn't drink nothing and they were telling me what I was being charged with and I was sick to my stomach."

Lieutenant McNally frankly admitted that he denied Malinski's request to see a doctor (R. 583), but testified that Malinski said he had "a nervous stomach" and requested a doctor "fifteen minutes after he was brought in" and told "he was going to be questioned on the Fox case" (R. 583).[15] McNally further testified that thereafter Malinski did not renew his request (R. 583) and that during Malinski's entire stay at the Bossert he ate and rested (R. 672).

On Sunday, October 25th, the police, together with Malinski and Spielfogel, entered an automobile near the hotel. The chauffeur, directed by Malinski, drove the car on the route Malinski took the night of the murder to Coney Island, where Malinski pointed out a restaurant in which he and his companions had tarried on the night when Fox was shot. He then directed the officers to the scene where the shooting occurred, and there identified several points of importance in connection with the events of that night (R. 644-646, 654-655).

Malinski's reply to this evidence was that he did not direct the chauffeur how to proceed, and that Spielfogel, speaking to him in Jewish, pointed out to him the restaurant and related to him more of the details of the robbery and the killing (R. 957, 974-975, 983-984).

[15] "Realization of the horrible deed which had been committed and that at last he had been discovered and was in the hands of the law must have had some effect even upon a hardened criminal. The onrush of the appreciation of guilt and its consequences have at times a tremendous debilitating effect" (*People* v. *Doran*, 246 N. Y. 409, 422).

On Monday afternoon, October 26th, Malinski was taken to the garage of the property clerk of the police department, where the car used in the robbery was stored. The officer who took him there testified that there were about 150 automobiles in the garage, and that he asked Malinski to pick out the car that was used in the robbery. Malinski, he testified, carefully looked around the garage and finally pointed to the Ford with a cloth top, and said that the door had been difficult to open and that he would try it and make doubly sure that this is the car used that night. Thereupon, Malinski tried the door and, finding it to be the same, positively identified the car without any help or suggestion from the police or any other person (R. 642-644, 658-659).

Malinski's version was that he had been shown a picture of the car before he went to the garage and that when he arrived there the following occurred (R. 958-959):

> "* * * I went in there and they were walking around and the next thing I knew he stopped at a car. He said, 'Does that look like the car?' He showed me the picture of the car. It looked the same so I looked at it and I said, 'I don't know.' He said, 'Open the door,' *so I took my handkerchief out of my pocket and I went over and opened the door. He said, 'why are you using the handkerchief?' I said, 'I am being framed up. I am not going to leave my prints on the car.'*
>
> Q. *Did you tell him why?* A. *Yes.*
>
> Q. *What did you tell him?* A. *I told him I was never in the car. I never seen the car.*"

And on cross-examination he reaffirmed that he said to the police officer (R. 988):

> "*I know all about this business and I am not going to let you frame me by putting my bare hand on the handle. I am going to use a handkerchief.*" [16]

[16] It is impossible to reconcile this testimony with Malinski's other claim that he had been beaten and threatened by the police and that his confession was the product of fear.

Several hours later Malinski made a full and detailed confession to the district attorney which was recorded stenographically at two o'clock in the morning of Tuesday, October 27th (R. 621-639). As already noted, Malinski's claim was that this confession was false, was made while under the influence of fear produced by threats, and that all the information contained therein was supplied by Spielfogel.

The extent to which Malinski strained credulity with his story that he said and did whatever Spielfogel told him is illustrated by the following incident. The written confession shows that Malinski identified the hat which was found under the abandoned car used in the robbery as being the hat he wore on the night of the commission of the crime (R. 637-638). The confession then shows (R. 639):

> "Q. Will you put your initials inside of the hat? A. Put it where?
>
> Q. Just inside the sweatband. A. (Witness complies.)
>
> Q. That is 'M. M.' which you have written in pen and ink on the inside of this sweatband? A. Yes, sir."

At the trial when he was asked about placing his initials in the hat he gave the following answers (R. 955):

> "Q. Now you put your initials in that hat did you not? A. In the police station.
>
> Q. That was on October 26th? A. The 27th, in the morning.
>
> Q. The 27th of October? A. That is right.
>
> Q. And you put your initials in because you were told to do it by the police? A. *Spielfogel says: 'What is the sense? They are only going to go to work on you again. Put them in there; that is nothing'.*"

The written confession lists the names of the persons "Present" at the time of the taking of the statement. Spiel-

fogel's name is not among them (R. 621). After the confession was read in evidence counsel for Malinski said he did not want to cross-examine the stenographer (R. 640). And later Malinski admitted the following (R. 975):

> "Q. Where was Spielfogel at the time you were giving this statement? A. *He was in the next room*."

(b) The undisputed facts.[17]

Malinski admitted that he had "no injuries" (R. 563-564). When he was arraigned in the Felony Court he made no complaint whatever to the presiding judge that he had been beaten, threatened or intimidated (R. 569, 615). Nor did he make any complaint to the district attorney who took the confession (R. 562). On the contrary, he told the district attorney that he was making the confession volun-

[17] At this point we call the Court's attention to a very serious error in petitioners' brief. At page 16 thereof appears the following:

> "What more conclusive evidence that the confession was the result of coercion and induced by threats could be furnished than the admission of the People. In the Brief in Opposition to the petition for certiorari it is said (p. 27):
>
> 'Malinski says he was beaten; the police deny that, the district attorney is candid enough to say that the police let him believe he was going to be beaten for the psychological effect such a mode of dealing with him might have upon him.'"

The author of the brief in opposition to certiorari never made any such concession. A reading of that part of the brief from which petitioners have clipped the above quoted excerpt shows that the author was illustrating how *the jury*, in view of the prosecutor's summation, might have reasoned if it decided to reject the confession as involuntary. This is unmistakably shown by the fact that immediately preceding the excerpt quoted by petitioners appears the following: "In other words, *the jury could have reasoned*"

tarily, that nobody forced him to do anything, and that he had not been mistreated (R. 639).[18]

It is also undisputed that Rudish and Indovino were arrested one day after Malinski's arrest (R. 1486). Yet, neither Rudish nor Indovino claimed to have been assaulted, although confined in the same hotel with the same officers, and neither of them confessed to the police or the district attorney (R. 1487).

Finally, it is conceded that on Friday, October 23rd, after Malinski took off his clothes so that the police could see whether there were any scars of bullet wounds on his body, he was compelled to remain in his shorts or "B. V. D.'s" and a blanket for the greater part of that day. But it is also beyond dispute that the oral confession which he made to the police on Friday was not used. As stated at page 20 of petitioners' brief, "No attempt was made to prove the details—to show what he said." It is also undisputed that Malinski was not arraigned until Tuesday, October 27th, about four days after his arrest, and that during that period of time he was frequently questioned. And it is admitted that with the exception of being permitted to speak every day with his former associate, Spielfogel, he was held incommunicado.

The Decision of the Court of Appeals.

Although the Court of Appeals affirmed the judgments by a divided vote it is noteworthy that the court was unanimous on two propositions:

(1) As Chief Judge Lehman, writing for the minority said,

[18] Under such circumstances the falsity of Malinski's claim that he had been beaten and threatened is evident. For "when no bruises are seen on the defendant's body and when with full opportunity he makes no prompt complaint to the officials or friends", it is evidence "that the defendant's tale of threats or beating is false and that the confession is voluntary." (*People* v. *Barbato*, 254 N. Y. 170, 173).

"Here we are agreed that a finding by the jury that the defendant's confession, though obtained while he was unlawfully detained without arraignment, is not against the weight of the evidence" (R. 1501).

(2) The court was unanimous in holding that neither Malinski nor Rudish was denied due process of law under the Federal Constitution.

Argument.

As to Malinski.

The question as to whether a confession is the result of coercion, physical or phychological, or the offspring of reasoned choice is often a difficult and elusive inquiry (*United States* v. *Mitchell*, 322 U. S. 65, 68). "No formula to determine this question by its application to the facts of a given case can be devised" (*Lyons* v. *Oklahoma*, 88 Law. ed. Adv. Op. No. 16, p. 1076, 1079). As a general guide this Court has held that even where there was abuse of power by officers of the law a State has the right to use the confession if the evidence negatives the view that the accused had "so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny or to refuse to answer" (*Lisenba* v. *California*, 314 U. S. 219, 241).

A reading of the evidence in the case at bar leaves no room for doubt that when Malinski made his confession on October 27th he was acting as a free agent and not under duress. There is a sharp conflict in the evidence as to his state of mind at the hotel on Friday, October 23rd, and there would be room for argument if the oral confession then made had been used by the State. But it was not used. Any doubts that might have existed as of that time are quickly dispelled by the subsequent events.

A conclusive illustration is the testimony of Malinski himself describing his conduct on Monday afternoon in the

garage of the property clerk of the police department. It will be recalled that Malinski testified that when the police asked him to open the door of one of the cars he took a handkerchief from his pocket and opened the door, and that upon being asked why he used a handkerchief he replied:

> "I am being framed up. I am not going to leave my prints on the car" (R. 958-959).

Such conduct is consistent only with self-possession, coolness, acumen and lack of fear. It is inconsistent with "deprivation of free choice to admit, to deny or to refuse to answer".

Moreover, if the police officer's testimony that Malinski identified the car as the one he used in the robbery and made the identification without any suggestion from anybody is true, then Malinski's incriminating identification clearly constitutes a voluntary confession. If on the other hand Malinski's testimony is true, then it is equally clear that at least by Monday afternoon he was in full control of his mental faculties, defiant and completely without fear.

At all events, one thing is beyond question and that is that there is a conflict of evidence on the issue of voluntariness of the confession. Under such condition the question of credibility is not for this Court to determine but for the trial court and jury (*Lyons* v. *Oklahoma*, *supra*, p. 1079-1080; *Lisenba* v. *California*, *supra*, p. 348).

The District Attorney's Summation.

In the prevailing opinion of the Court of Appeals, the author thus discusses the subject:

> "It is next urged upon us that the Assistant District Attorney gave his views as to the reason why Malinski was left in his underclothes and we are asked to reverse because of that. The three defendants on trial were represented by experienced coun-

sel. It is true the Assistant District Attorney made the statements quoted in the dissenting opinion. The summation covers sixty-three printed pages. The first quotation is twenty-nine pages before the second. The District Attorney was interrupted by counsel fourteen times. Nearly all of those objections were made by the attorney for Malinski. Yet no interruption by objection was made to the remarks quoted. *That is no excuse for the remarks but it is some indication of the fact that none of the counsel took them seriously.* The remarks were indefensible. Whether under the circumstances a new trial should be ordered for Malinski because of these disconnected and disjointed utterances which at the time of their utterance brought not a single one of the counsel to his feet to make objection, is a matter of judgment. Our judgment is that the verdict should stand and be affirmed. Even apart from the fact that it did not appear important enough to counsel to cause them to register an objection immediately, the effect of the utterances it seems to us would inure to the benefit of Malinski rather than against him and they did not relate to Rudish or Indovino." (Italics ours.)

The record fully supports Judge Conway's observations. It is true that none of counsel took the objectionable remarks seriously, either as they were uttered, or as the summation ended. Thus, at the close of the summation, counsel for Malinski took exception to the reference to Malinski's sister and the failure to call her as a witness and the argument that damaging testimony would have been elicited from her, if she had been called. The court sustained the objection and instructed the jury to disregard the argument (R. 1311). At the same time the court denied a motion for the withdrawal of a juror (R. 1311).

As we turn to counsel's interruptions of the summation, we find that some, not too serious, objections were made to references to the testimony. They amounted simply to a

colloquy between court and counsel and the result seems to have been satisfactory.

Then, we find that the district attorney, referring to Shirley Di Pisa, argued (R. 1268):

> "Where is his sister Shirley Di Pisa? Where is that girl? Where is that woman?"

Counsel objected to this argument and was overruled. Again the district attorney's argument was (R. 1290):

> "* * * and I say, if there was any answer to it, and it did not happen, the sister, Mrs. Di Pisa, should be in here."

Again counsel objected to the argument. The objection was overruled (R. 1290). The district attorney continued:

> "And if she is not here, you can draw the inference that her testimony would be damaging to him."

Counsel again objected, but no ruling was made. However, as we have seen, the court, at the conclusion of the summation, reversed itself as to the legal effect of Mrs. Di Pisa's absence.[19]

The district attorney, discussing Kovner's testimony, argued (R. 1293):

> "* * * he saved these three defendants from being killed at the hands of Beitler—why would he save them one year and then come down here from Attica prison, and try to convict them of murder."

Counsel for Malinski objected to the statement and the court upheld him, saying (R. 1293):

> "The jury will disregard the District Attorney's statement unless it is borne out by the fact. The jury's recollection of the evidence will control."

---

[19] The ruling was in Malinski's favor, but it was incorrect (*People v. Leonardo*, 199 N. Y. 432, 446).

The district attorney later argued with respect to the psychiatrists' examinations of Spielfogel "and the others", and the fact that it is a common practice for criminals to lie to such examiners (R. 1304):

> "Of course they lie about these things. These men told you they are up in the 'bug house'. Indovino says he was up in the 'bug house'."

The objection of counsel for Indovino to the argument was sustained.

It is plain, therefore, that counsel did not hesitate to interrupt the district attorney's summation, but the interruptions were upon immaterial things, while the more important ones—the "indefensible statements" as they have been characterized—were entirely ignored. We repeat, it is true, therefore, that counsel, at least as they were uttered, did not take them seriously.

We turn now to what happened at the close of the summation. Counsel for Malinski asked for the withdrawal of a juror and the declaration of a mistrial "upon all the other exceptions taken during the course of the summation". Then occurred (R. 1311):

> "The Court: What other points do you have so that there will be no mistake?
>
> Mr. Solovei: The ones I made during the summation.
>
> The Court: Repeat them.
>
> Mr. Solovei: I don't know. I made them during the time I got up.
>
> The Court: Repeat them.
>
> Mr. Solovei: I cannot remember now. The record will show.
>
> The Court: The motion is denied."

Thus far where is there any indication, anywhere, that counsel regarded the "indefensible statements" seriously?

One of counsel for Rudish now interposed an objection to the district attorney's argument. The court pointed out

that it was mere argument and overruled the objection (R. 1312). Thus far, counsel for Rudish, too, took no occasion to voice their objections to any of the district attorney's "indefensible statements".

One of counsel for Indovino now objected to the summation "in its entirety". The court asked counsel to point out what he had in mind (R. 1313). A long colloquy ensued in which parts of the testimony were discussed. Finally, counsel for Indovino objected to the district attorney's statement that "there is nothing in holding these defendants for sixty hours or more without arraigning them". The court sustained the objection (R. 1314). Further lengthy colloquy followed. No reference is made therein to the "indefensible statements". It was not until the very end that one of counsel for Rudish objected to the remarks of the district attorney with respect to the detention of Malinski as "highly improper, and illegal". The court inquired:

> "Does Malinsky's counsel make an objection?"

Counsel for Malinski vaguely replied:

> "I made my objection on the record."

We have seen that he did not. Then, plainly as an afterthought, counsel asked for the withdrawal of a juror and the declaration of a mistrial on the basis of the district attorney's remarks (R. 1320). The motion was denied. The court acted within its discretion.

> "There can be no doubt as to the power of the trial court, in the exercise of a sound discretion, to declare a mistrial and to discharge the jury before the final submission to them of the issues, when, in the opinion of the court, matters have arisen during the course of the trial which make such procedure advisable. This is one of the ordinary powers resident in the court; and while the question of the

proper exercise of the power is open to review, there is no question that the power does exist" (*People ex rel. Herbert* v. *Hanley*, 142 App. Div. 421).

"We have no statute defining the limitation of the exercise of that discretion" (*People* v. *Montlake*, 181 App. Div. 578).

We believe we have proved that counsel did not take the district attorney's "indefensible statements" seriously.

If counsel were as unperturbed as the record discloses they were about the objectionable remarks of the district attorney when uttered and asked for no ruling upon them, it is plain that the complaint later made concerning them, and now repeated, is not in all sincerity.

We are aware that this court is not concerned with the district attorney's summation and would have no control over it ordinarily, and that its only significance, as a Federal question, goes to the question of whether or not it is true that Malinski was coerced into the confession he made to Mr. Hefferman and therefore denied process of law. The only reason we have referred to counsel's quiescent reaction to the summation and failure on the part of Malinski's counsel to voice any objection to the "indefensible statements", is that it is fair, sound argument on Judge Conway's part when he says it seemed that the district attorney's utterances "would inure to the benefit of Malinski rather than against him".

These remarks inured to Malinski's benefit for this reason:

It was for the jury to determine whether or not Malinski's confession was voluntary. Malinski's claim was that it was not. The issue was met by the testimony of the police officers that he was not beaten or coerced. If the district attorney conceded that the police endeavored to induce in Malinski a belief that he was going to be beaten, if the district attorney went that far, then, if the scales were evenly balanced, the jury might well have accepted Malinski's version of the circumstances under which the

confession was obtained. It was the jury's right to accept it or reject it. In other words, the jury could have reasoned:

Malinski says he was beaten; the police deny that; the district attorney is candid enough to say that the police let him believe he was going to be beaten for the psychological effect such a mode of dealing with him might have upon him.

The jury might well have reasoned that the district attorney's concession lent verity to Malinski's claim and might have accepted his testimony in its entirety as truthful.

We say it is a fair conclusion that that was the attitude of Malinski's counsel in not interrupting his opponent; that he felt that, instead of hurting Malinski, the district attorney's argument helped him and he was willing, by remaining silent, to speculate that such an effect would follow.

Finally, in so far as Malinski is concerned, the majority opinion in the case at bar is in consonance with *People* v. *Slover* (232 N. Y. 264):

> "We have assumed in each case on its particular facts that the jury were not affected by such matters, but by affirming the judgment of conviction we have not approved the conduct of the district attorney. We have dealt with it as the result of 'well-intentioned though misguided zeal' which probably was unheeded by the jury and had no inference on their final action, while in the case of a vigorous dispute over a defendant's mental capacity we have not hesitated to order a new trial for such excesses on the part of the prosecutor. (*People* v. *Esposito*, 224 N. Y. 370. See, also, *People* v. *Mull*, 167 N. Y. 247; *People* v. *Wolf*, 183 N. Y. 464, 472.)"

The court, earlier (*People* v. *Conklin*, 175 N. Y. 333) had said:

> "The case must be quite exceptional where a question of law, reviewable in this court, is presented, based upon the address of the prosecuting officer."

We submit that this record does not present such an exceptional case.

In *People* v. *Watson* (216 N. Y. 565) the prosecutor advanced this extraordinary suggestion to the jury:

> "*Now there is no sense in burdening the state with this man if he is guilty of murder in the first degree. If you are satisfied that he is guilty of murder in the first degree there is no sense in doing that.*" (Italics ours.)

The court, in condemning the appeal, pointed out that no exception was taken to it but that it had the power, nevertheless, to disregard the omission. In refusing to avail itself of its power, the court said:

> "The possibility of the defendant's substantial rights having been affected is materially lessened when the trial court expressly directs the jury to disregard such statements."

We submit that the trial court here fully protected the petitioners' rights in virtually every instance in which the court's attention was called to remarks by the district attorney that might have the effect of prejudicing them.

As to Rudish.

That Rudish has no standing here, is, we believe beyond cavil. Rudish did not make a formal confession. The only confession he made is to be found in his admissions to Spielfogel before and after the commission of the homicide. Therefore, there is no question of due process involved as to him, because there is nothing that he said that was coerced from him in any manner. All that he said was said freely and voluntarily. It is sought to invoke the due process amendment in Rudish's favor, however, because, it is said, the "device" by which the court suppressed the names of his confederates in Malinski's con-

fession as it was read to the jury proved "futile". In support of the claim that, therefore, Rudish's rights were prejudiced, *Anderson* v. *United States* (318 U. S. 350) is cited. An excerpt of the opinion is set forth. What is not set forth is its context:

> "So also, while the trial judge appeared to admit the confessions 'only to be used against the persons who made them' his charge bound the jury to no such restricted use of the confessions. On the contrary, from what the trial judge told them the jury had every right to assume that in ascertaining the guilt or innocence of each defendant they could consider the whole proof made at the trial. There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others."

That is not the situation here. Before we proceed to discuss what happened here, we beg leave to point out that neither *Anderson* v. *United States*, *supra*, nor *Viereck* v. *United States* (318 U. S. 236) has any application here. Therefore, no Federal question is involved in Rudish's case.

"Matters of this sort are addressed to the discretion of the trial judge" (*Stroud* v. *United States*, 215 U. S. 15, 20), and where the decision is that of a state court it is not subject to review here (*Barrington* v. *Missouri*, 205 U. S. 483; *Thomas* v. *Texas*, 212 U. S. 278, 281-282).

In the case at bar as Malinski's confession was about to be read to the jury, when counsel for Rudish (Mr. Carabba) and Indovino (Mr. Geoghan), asked that the jury be instructed that the confession was binding only on Malinski, the court responded (R. 618-620):

> "I am going to make certain observations, and I am going to ask the jury to pay strict heed to what

I say. You are about to hear an alleged statement read. The Court has together with counsel read that statement, and the Court is forewarned as to what it contains. You will hear read matters concerning a Mr. X and Mr. Y. Those names, Mr. X and Mr. Y, have been substituted by order of the Court for names in the confession. Those names have been deleted by order of the Court from the confession: that is, names other than the defendant Malinski and the defendant Beitler. You have no right to speculate as to who Mr. X and who Mr. Y are. Is that clear? You have no right to jump to any conclusions as to who Mr. X and Mr. Y are. As far as you know, it may be Christopher Columbus, it may be John Doe, it may be one of five or ~~five~~ hundred million people. Is that clear? You ~~have~~ have no right to infer that the X and the Y referred to are either or both of the other defendants, namely, the defendant Rudish and the defendant Indovino. Now, I cannot impress that upon you too strongly. I believe my English is simple and it is understandable, and I am addressing you jurors in a forthright manner. I am going to conduct this case in the manner provided by law and in fairness to everybody concerned. Each defendant's case must be judged on its own merits, and only the evidence that applies to him must be considered, and no other evidence. The jury has no right to guess or surmise. The jury's verdict must be based only on evidence. I have cautioned you in a manner that cannot be misunderstood. Now, when you hear this confession read the X and the Y are anonymous persons, and you have no right to even guess as to who they are. Can I say more than that, Mr. Geoghan? Can I say more than that, Mr. Carabba?"

Brief colloquy followed between the court and counsel which ended thus (R. 620):

"The Court: Is there anything else you desire the Court to do?

Mr. Geoghan: *Nothing whatever, I think it is full and complete.*

Mr. Carabba: *Nothing whatever on behalf of the defendant Rudish.*

The Court: *You are both satisfied with the instructions?*

Mr. Geoghan: *Yes, your Honor.*" (Italics ours.)

The court followed a procedure that has been pursued almost without exception in the State of New York in cases of joint trials.

In *People* v. *Snyder* (246 N. Y. 491), the court pointed out:

> "Throughout the trial and in his charge, the trial justice with scrupulous care protected the rights of both defendants. He pointed out to the jury that they might not consider the confession of either as against the other. The fact that one defendant has made a confession which will be admissible against himself but not against a co-defendant may be a circumstance which enters into the court's consideration of whether a joint trial would be fair (*Commonwealth* v. *Borosky*, 214 Mass. 313; *United States* v. *Ball*, 163 U. S. 662). It depends upon the circumstances of the particular case whether a jury can weigh properly the testimony produced upon the various issues that may arise in a joint trial."

In *People* v. *Fisher* (249 N. Y. 419), the court, passing upon the same issue, said:

> "Varying circumstances bear upon the soundness of discretion to be exercised under section 391 of the Code of Criminal Procedure in refusing to grant motions for separate trials. The rule is not doubtful. * * * Its correct application must rest upon the facts in each case. Prospection by the trial judge is not final. In a case where, without the existence of a confession by one defendant, the evidence

against another would be too weak to justify a conviction, or even where a conviction would be doubtful, our review of the judgment would compel us to conclude that an abuse of discretion had been committed."

As we indicated in the beginning, Rudish completely foreclosed himself from relief when he declined, in the midst of the trial, an offer of a separate trial as to him. The record discloses (R. 766-767):

> "The Court: Do I understand, Mr. Carabba, that you made a motion for a severance in this case?
>
> Mr. Carabba: No, I did not. I was under the impression that we did, and I just asked Mr. Meadow. We had discussed it.
>
> The Court: Do you make a motion for a severance?
>
> Mr. Carabba: No, I don't. *I am going to stand on this record.*
>
> The Court: *You don't want a severance?*
>
> Mr. Carabba: *Not at this time, Judge Leibowitz.*" (Italics ours.)

Later, counsel for Rudish emphasized his position when the court inquired whether he wished to take advantage of *People v. Fiola*,[20] (R. 769):

> "Mr. Carabba: I don't know anything about the Fiola case. *All I can truthfully answer, your Honor, is that we do not wish a severance at this time.*" (Italics ours.)

The subject was never opened up again.

But that is not all, as far as Rudish is concerned. Counsel for Rudish on the trial, in his summation, far from

[20] (202 N. Y. 276.)

attacking the police conduct of the case, gave full countenance to it. He said to the jury (R. 1173-1174):

> "I am not here to pass upon or even to criticize the conduct and the deportment of the police officers in this case. You will recall that when the witness, the defendant Rudish, took the stand, he said that from the time of his arrest he told the detectives and the District Attorney that he knew nothing about this crime. You will have to say to yourselves, 'Was this Room 608 in the Hotel Bossert, a station house?' 'No.' 'Was it the office of the District Attorney?' 'No.' 'Was it a Magistrate's Court?' 'No.' It was a room used and occupied by the police, to bring whoever they suspected of having anything to do with this crime, where they could work out the process of giving a man a workout. That is all it is. A reputable hotel in this County used by the police to question and question and question for hours those that were accused of crime. *I find no fault with that. I find no fault with the police using every honest effort to bring to justice those who have committed this cowardly crime of killing Leon Fox, whom I have had the pleasure of knowing and knew personally.*". (Italics ours.)

Conclusion.

Conway, J.:

> "When all is said and done these defendants had a fair trial and both confessed their guilt to persons other than the police or the District Attorney."

We humbly submit that 'twould be a piece of supererogation to elaborate on the theme.

II.

Therefore, the judgments below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1944.

Morris Malinski and Sidney Rudish, Petitioners, *vs.* The People of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 26, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

Malinski and Rudish were convicted along with one Indovino of the murder of Leon Fox, a police officer who, late at night, was escorting a manager of a theatre to a bank depository. The details will be found in 292 N. Y. 360. There were no eye witnesses to the crime who could identify the robbers. Malinski was implicated by various witnesses—by Spielfogel, an old friend and a criminal serving a sentence of thirty to sixty years in Sing Sing; by Malinski's girl friend; by Malinski's brother-in-law. Each testified that Malinski confessed the crime to him or her. The confessions to the girl friend and to the brother-in-law were made a few hours after the crime and were merely that Malinski had shot a cop; but the confession to Spielfogel disclosed in detail the planning and execution of the crime. Malinski denied making these confessions. Yet as the New York Court of Appeals pointed out (292 N. Y. p. 370) those confessions and other evidence of the State were sufficient, if believed, to support the conviction, wholly apart from another confession around which the present controversy turns. But the circumstances under which the latter confession was obtained raised the substantial federal question which prompted us to grant the petition for a writ of certiorari.

I.

Malinski was arrested while on his way to work on the morning of Friday, October 23, 1942. The police did not then arraign him but took him to a room in the Bossert Hotel in Brooklyn where he arrived about 8 A. M. He was immediately stripped and kept naked until about 11 A. M. At that time he was allowed

to put on his shoes, socks and underwear and was given a blanket in which to wrap himself. He remained that way until about 6 P. M. Malinski claims he was beaten by the police during that period. The police denied this. There was no visible sign of any beating, such as bruises or scars; and Malinski made no complaint to the judge on arraignment nor to the jail authorities where he was later held. Sometime during Friday morning Spielfogel was brought to the hotel. He and Malinski were put alone together in a room sometime that afternoon. Shortly after their conference—apparently around 5:30 P. M. or 6:00 P. M.—Malinski confessed to the police. After it was made Malinski was allowed to dress. Malinski was kept at the hotel that night and the next three days. The record does not show exactly how long and frequent the questioning was after the first confession. But it is clear that Malinski was questioned in the early hours of Saturday, the 24th and at other times during that day. He was further questioned on Sunday, the 25th, and taken with Spielfogel from the hotel to the scene of the crime where he identified several places which had a relationship to the commission of the crime and where he pointed out how the crime was executed. On Monday, the 26th, he was taken from the hotel to the police garage where he identified the automobile used in the robbery. At about 5:00 P. M. on Monday he was taken to a police station and questioned. On Tuesday morning, October 27th, about 2 A. M. he made a confession at the police station. That confession was introduced at the trial. Shortly thereafter—about 4:00 A. M.—he was booked and put in a cell and soon arraigned.

The trial court held a preliminary hearing on the voluntary character of the confession of October 27th before allowing it to be introduced in evidence. There is a question in the case whether the confession of October 23rd as well as that of October 27th was submitted to the jury, a question to which we will return. It is sufficient here to note that the trial court charged the jury that a confession should not be considered by them unless they found beyond a reasonable doubt that it was voluntary. And they were told that although the delay in arraignment was not conclusive, they might consider it in passing on the question of voluntariness. The Court of Appeals sustained the judgment of conviction by a divided vote.[1] But the question whether there has been a vio-

[1] The Court of Appeals did not divide on the issue which is before us. The dissenting judges thought (1) that Spielfogel was an accomplice and

lation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts. *Chambers* v. *Florida*, 309 U. S. 227; *Lisenba* v. *California*, 314 U. S. 219; *Ashcraft* v. *Tennessee*, 322 U. S. 143.

If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. *Ashcraft* v. *Tennessee*, *supra*, p. 154. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. *Lyons* v. *Oklahoma*, 322 U. S. 596, 597.

If the evidence alone is considered, there is serious doubt whether the confession made one late afternoon of Friday, October 23rd (the first day of Malinski's detention) was admissible under the rule of *Chambers* v. *Florida*, *Lisenba* v. *California*, and *Ashcraft* v. *Tennessee*, *supra*. If the confession had been the product of persistent questioning while Malinski stood stripped and naked, we would have a clear case. But it was not. Malinski was stripped when he arrived at the hotel so that he might be examined for bullet wounds.[2] He remained in that condition several hours—much longer than any such physical examination could possibly justify. But it does not appear that he was subjected to more than occasional questioning during that period. No confession was obtained from him at that time. He said he was beaten; but that was disputed. And the assertion has such a dubious claim to veracity that we lay it aside. In any event, he soon had his shoes, socks, and underwear back on and a blanket in which to wrap himself. He complained of that treatment in his testimony. The police justified it with the dubious explanation that it was to make certain that Malinski did not escape. Yet the record does not show any persistent and incessant—let alone gruelling—questioning by the police while Malinski was only partially clothed. There are many gaps in the chronological narrative of what transpired that day. But several circumstances stand out. Malinski was held incommunicado; he was not allowed to see a lawyer, though he asked for one, and he was not allowed to see friends.

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that the conviction of Rudish was not supported by corroborative evidence; and (2) that the instruction concerning the voluntary character of the confession was not adequate.

2-While the robbers were escaping the wounded policeman fired several shots some of which hit the car in which they made their escape.

with one exception.[3] That exception was Spielfogel.[4] As we have noted, he and Malinski had a private conference that afternoon. Malinski was told that Spielfogel was there. Malinski asked to see him. Spielfogel's version of what transpired varies from Malinski's. The former says that Malinski told him the police knew so much that Malinski figured he "might as well go out there and tell them the rest." Malinski said that he asked Spielfogel, "What are you doing with me?"; and that Spielfogel replied, "don't let them hit you. You know you didn't do it. Go out and say I told you to tell the truth." Shortly thereafter Malinski made his confession of October 23rd. If that evidence alone is not sufficient to show that that confession was coerced, the comments of the prosecutor place it beyond doubt. For in his summation to the jury he made certain statements which the Court of Appeals said were "indefensible" (292 N. Y. p. 373) and which we think are sufficient to fill in any gaps on the record before us and to establish that this confession was not made voluntarily. He said that Malinski "was not hard to break"; that "He did not care what he did. He knew the cops were going to break him down." And he added:

"Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology — let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

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[3] The matter was described by the prosecutor in a rather shocking manner: "They hold men for several days. Are you satisfied with that? They are not going to let him go home, or let him get hold of a smart mouthpiece to preach about his rights and sue out writs. You want a District Attorney in this county that is worth his salt, not a powderpuff District Attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a pat on the back and say, 'Do you want anything? Do you want to have your lawyer or your wife or somebody else?' In fact after that they would not even let him see Mr. Math, an assistant in our office; they would not even let him talk to a rabbi. Do you think McNally, 17 years in the Police Department, is going to let this jerk from the East Side tell him his business."

[4] As the Court of Appeals points out (292 N. Y. p. 375), Spielfogel and Malinski had an agreement that if either went to prison the one who was free would help take care of the other's family. After Spielfogel went to Sing Sing Malinski contributed for a while to the support of Spielfogel's wife. When Malinski refused to pay any more, Spielfogel unburdened himself to two other convicts, Yellin and Kovner, "but with no intention of acting against Malinski for, curiously enough, testimony is in this record that, after knowledge of what had occurred in the shooting of Fox reached the police department and a lieutenant of police was sent to Sing Sing prison to interview Spielfogel, he refused to talk to the police officer. Even after that police officer had told him all that Spielfogel must have told to Yellin and Kovner he still evinced no interest in helping the police. It was only later that he consented to talk."

If we take the prosecutor at his word, the confession of October 23rd was the product of fear—one on which we could not permit a person to stand convicted for a crime.

But it is said that this coerced confession was not introduced in evidence, that it was submitted to the jury only insofar as it threw light on the voluntary character of the subsequent confessions, and that under the rule of *Lyons* v. *Oklahoma, supra*, p. 601, the adequacy of that instruction to the jury is solely for the state courts to determine. We do not think, however, that *Lyons* v. *Oklahoma, supra*, fits this case.

The confession of October 23rd was oral. Its details were not put in evidence. But Spielfogel, a witness for the prosecution, adverted to it in his testimony, saying that Malinski told "everything" at that time. A police officer testified on behalf of the prosecution to the same effect. The prosecutor referred to it in his summation in language which we have already quoted. He added that "Six o'clock in the evening after he (Malinski) was picked up, he told the whole thing". When the confession of October 27th (which was a detailed confession taken down by a stenographer) was offered in evidence, a preliminary hearing was had. That hearing covered the voluntary character of the October 23rd confession as well as the October 27th confession. The trial court in its charge to the jury reviewed the events leading up to the confession of October 23rd—the prosecutor's version, Malinski's version. It then referred to the delay in arraigning Malinski, stating that the police claimed they were willing to arraign Malinski on the day of his arrest but that Malinski preferred to stay at the hotel with Spielfogel. It then charged:

"Be that as it may, I charge you that it was the duty of the police to arraign the defendant before the nearest Magistrate without unnecessary delay, and, further, that if a police officer failed or refused to perform such duty, he is guilty of a misdemeanor.

"But, gentlemen, you will bear in mind that the police department is not on trial in this case. This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinsky, including the one made in the early hours of October 27th at the Bath Beach station house.

"However, I am charging you that the failure to arraign, in and of itself, is not conclusive against the People, and does not in and

of itself, standing alone, destroy the validity of the confession. Is that clear?

"On the question whether Malinsky was coerced, you may consider that he made no complaint to the Magistrate when arraigned and did not seek the services of the jail physician. That evidence, if true, is not, however, conclusive against Malinsky, but may be considered by the jury on the issue of the voluntariness of the confession."

Malinski made no objections to these references to his confession of October 23rd. And while he asked for a mistrial because of the prosecutor's comments, he made on this phase of the case no requests to charge which were refused. The Court of Appeals, however, did not hold that Malinski was precluded from objecting[5] to the use made at the trial of his confession of October 23rd. It considered his objection that "it was error for the court to submit to the jury the confession made by Malinski orally on October 23rd" as well as the other three confessions made to the police. 292 N. Y. p. 370. And it made plain, when it held that Malinski's "confession" should not have been excluded as a matter of law, that it meant "not only the confession made orally to a police officer on the Friday night of the arrest but also the two automobile trips on Sunday and Monday, one to the police garage to permit Malinski to identify the automobile used in the crime and the other to Coney Island to revisit a restaurant and the scene of the crime, and the confession to the District Attorney which was taken stenographically in the early morning of Tuesday, October 27th." 292 N. Y. pp. 373-374. Its ruling was that none of the four confessions was involuntary as a matter of law. Thus as we read the opinion of the Court of Appeals, it reviewed the judgment of conviction on the basis that all four confessions to the police had been submitted to the jury. We find no indication that it construed the record to be like the one in *Lyons* v. *Oklahoma*, *supra*, where consideration of the first coerced confession was strictly limited to the voluntary character of subsequent confessions. Nor do we think that the record before us can be fairly construed in that manner.

There were repeated references at the trial to the confession of October 23rd. The prosecutor made emphatic references to it in his summation. On this record the fact that Malinski confessed to the crime shortly after he was arrested stands out in bold relief. The use made of the confession could hardly have been more

[5] New York has the rule that in capital cases a new trial may be ordered in the interests of justice though no exception was taken in the trial court. Gilbert's Anno. Criminal Code & Penal Law (1943) § 528; People v. Jung Hing, 212 N. Y. 393, 405; People v. Lytton, 257 N. Y. 310, 313.

effective had its details been put in evidence. It was not insulated from the trial. The part of the charge to the jury which we have quoted may possibly have been an effort in that direction. But it is more susceptible of the interpretation that the delay in arraignment, not the first confession, was to be considered "solely on the question as to whether or not the alleged confession later made was the result of the coercion". That seems to have been the interpretation given the charge by the Court of Appeals. 292 N. Y. p. 374. No more explicit charge was given. The jury at no time was admonished that it could not convict on the basis of the first confession nor consider it as evidence against Malinski. We must consider the case, therefore, as one in which a coerced confession was employed to obtain a conviction. Coerced confessions would find a way of corrupting the trial if we sanctioned the use made of the October 23rd confession in this case. Constitutional rights may suffer as much from subtle intrusions as from direct disregard.

It is thus apparent that the judgment before us rests in part on a confession obtained as a result of coercion. Accordingly a majority of the Court do not come to the question whether the subsequent confessions were free from the infirmities of the first one.[6]

II.

We have not mentioned Rudish. He did not confess to the police. He was tried jointly with Malinski, his counsel electing not to ask for a severence. We are asked to reverse as to Rudish because the confession of October 27th which was introduced in evidence against Malinski was prejudicial to Rudish. It is argued that that course is indicated by *Anderson* v. *United States*, 318 U. S. 350. In that case we reversed a judgment of conviction against all the defendants though the confessions which had been introduced were the confession of only some of them. But in that case we were reviewing a criminal proceeding in a federal District Court over which we have more control than we do over criminal trials in the state courts. *McNabb* v. *United States*, 318 U. S. 332. Moreover, in the *Anderson* case the jury was told that in considering the guilt or innocence of each defendant they could consider the whole proof made at the trial. And it appeared that the prosecution leaned heavily on the confessions to establish its case against all the defendants. The furthest we have gone in a comparable case from a state court is to vacate the judgment

[6] Mr. Justice BLACK, Mr. Justice MURPHY, and Mr. Justice RUTLEDGE join in Part I of this opinion.

against the co-defendant who did not confess and remand the case to the state court for further consideration. Thus in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155, we followed that procedure, at the suggestion of the Attorney General of the State, where the judgment against the co-defendant who did not confess was sustained by the state court on the assumption that the confession which we held to be coerced was properly admitted and that the conviction of the defendant who did confess was valid.

We do not believe that procedure is appropriate in this case even though it be assumed *arguendo* that the confession of October 27th was involuntary. It is true that that confession referred both to Rudish and to Indovino. But before that confession was offered in evidence the trial court with the complete approval of counsel for Rudish worked out a procedure for protecting Rudish and Indovino. "X" was substituted for Rudish, "Y" for Indovino. The jury were plainly instructed that the confession was admitted against Malinski alone and that they were not to speculate concerning the identity of "X" or "Y". When it came to the charge, the trial court submitted the case against Rudish separately from the one against Malinski.[7] The Court of Appeals in sustaining the judgment against Rudish in no respect relied on any confession to the police which Malinski made. And when it turned to the comments of the prosecutor, which we have quoted, it noted that they concerned Malinski not Rudish. 292 N. Y. p. 373.

On this record the questions raised by Rudish involve matters of state procedure beyond our province to review. *Barrington* v. *Missouri*, 205 U. S. 483. Since the case against him, both as tried and as sustained on review, was not dependent on Malinski's confession of October 27th, we think it inappropriate to vacate the judgment as we did in *Ashcraft* v. *Tennessee*, *supra*, though we assume that that confession was coerced. Whether our reversal of the judgment against Malinski would as a matter of state law affect the judgment against Rudish is not for us to say. In each case our mandate will provide for a remand to the Court of Appeals for proceedings not inconsistent with this opinion.

The judgment against Rudish is affirmed.

The judgment against Malinski is reversed.

It is so ordered.

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[7] This treatment of the matter seems to have followed the procedure adopted in New York in case of joint trials. See People v. Snyder, 246 N. Y. 491, 497; People v. Fisher, 249 N. Y. 419, 424, 427.

SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1944.

Morris Malinski and Sidney Rudish, Petitioners, *vs.* The People of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 26, 1945.]

Mr. Chief Justice Stone.

Mr. Justice Roberts, Mr. Justice Reed, Mr. Justice Jackson and I think the judgment should be affirmed as to both petitioners.

Malinski, charged with murder, made several confessions of guilt, which were introduced in evidence at his trial. Two, made to the police, are alleged to have been coerced, the first on October 23rd and the other four days later on October 27th. During that time he admitted to the police other isolated facts which tended to fasten guilt upon him. Three friends of Malinski also testified that on several occasions shortly after the commission of the crime and long before his arrest, he voluntarily admitted to them and to his sister that he had committed the crime.

The testimony as to whether the first confession to the police was coerced was sharply conflicting. There was no evidence that petitioner was subjected to any coercion at or about the time of the second confession to the police, save as the jury could find that the coercion, if any, attending the first confession continued to operate so as to induce the second.

The trial court, after reviewing fully the evidence of petitioner's detention and the coercion by the police which is said to have attended his first confession, and of the delay in his arraignment, instructed the jury:

"This testimony was adduced solely on the question as to whether or not the alleged confession later made was the result of the coercion, either direct or implied, which is prohibited by the statute, and which invalidates a confession if made. If you should find that the arraignment of the defendant was delayed, you may consider that on the question of the voluntariness of any confession made by Malinsky, including the one made in the early hours of October 27th. . . ."

The trial court also correctly instructed the jury that petitioner's contention was that the confession of October 27 was tainted by the detention and coercion which had preceded it, and that "you must find beyond a reasonable doubt that this confession was a voluntary one before you would have the right to consider it." With respect to this later confession, the jury was further instructed:

"If you find beyond a reasonable doubt that the confession is a voluntary one, you will then determine whether or not the statements inculpating the defendant, therein contained, are true. If you shall have resolved both these questions in favor of the prosecution, then and only then will you consider the confession in determining the guilt or innocence of the defendant. . . ."

There were no exceptions to these instructions and no requests for a further charge on this subject.

After a painstaking review of the facts, the New York Court of Appeals unanimously sustained the jury's verdict that the confessions were not coerced.[1] That court, on appeal from a judgment of death, has power, which we are not free to exercise in a case coming from a state court, to make new findings of fact, Art. 6, § 7 of the New York Constitution of 1939;[2] *People* v. *McGrath*, 202 N. Y. 445, 450, and also to give judgment without regard to technical errors, defects or exceptions not affecting substantial rights. N. Y. Code Crim. Proc., § 542.

It seems to be recognized by this Court that the question whether the second confession was coerced was properly submitted to the jury. But it holds that the first confession was coerced and was submitted to the jury as itself proof of guilt, and that for that reason the verdict must be set aside although the jury found under the instructions of the court, which we have quoted, that the second confession was not coerced.

Even though the first confession were the product of coercion, the trial court, as we have pointed out, instructed the jury that the evidence with respect to the first confession was adduced only to show that the second was coerced. And the jury was instructed that it could consider the second confession, only if it found it

[1] The chief judge and two others, dissenting, thought that the conviction should be reversed because of the insufficiency of the charge as to the delay in arraignment; they apparently relied on state grounds, and not on the federal constitution.

[2] The amendment to Art. 6, § 7, effective January 1, 1944, retains this power in the Court of Appeals.

voluntary, and that it could convict in that case. In view of these instructions, we cannot say that the first confession was submitted to the jury, or that in the absence of any exception or request to charge more particularly, there was any error, of which petitioner can complain. Hence the jury's verdict must be taken as conclusively establishing that the second confession was voluntary and was not induced by any coercion attending the first. *Lyons* v. *Oklahoma*, 322 U. S. 596.

But even if it could be said, as the Court of Appeals seems to have thought, that the jury's verdict was a determination that the first confession was not coerced, we perceive no ground on which that determination can be disregarded. This Court recognizes that if only the testimony submitted to the jury be considered, the question whether the first confession was coerced was for the jury. The Court sets aside the jury's verdict solely because of the interpretation it places upon the conflicting testimony in the light of certain remarks, which the opinion of Mr. Justice DOUGLAS quotes, made by the prosecuting attorney in the course of his summation to the jury. But the prosecutor did not testify in the case, and it does not appear that he was present at any of the interviews of petitioner by the police, or had any knowledge of the alleged coercion. At most, his remarks were an ill advised attempt at justification of the coercion which the defense had alleged. He added no word by way of proof or admission to the evidence already before the jury. The jury, acting within its province, could have concluded, as it evidently did, that the prosecutor's remarks did not tend to prove anything more than his own ineptitude. The Court's decision thus sets aside the conviction by the process of re-weighing the conflicting testimony as to the alleged coercion, in the light of the arguments addressed to the jury.

It is not the function of this Court, in reviewing, on constitutional grounds, criminal convictions by state courts, to weigh the evidence on which the jury has pronounced its verdict, also in the light of the arguments of counsel, or to sit as a super-jury. We have, in appropriate cases, set aside state convictions as violating due process where we were able to say that the case was improperly submitted to the jury or that the unchallenged evidence plainly showed a violation of the constitutional rights of the accused. *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227; *Ward* v. *Texas*, 316 U. S. 547. But we have

not hitherto overturned the verdict of a state court jury by weighing the conflicting evidence on which it was based.

The rightful independence of the states in the administration of their own criminal laws in their own courts requires that in such cases we scrupulously avoid retrying the facts which have been submitted to the jury, except on a clear showing of error substantially affecting the constitutional rights of the accused. We agree that the controlling principles upon which this Court reviews on constitutional grounds a state court conviction for crime, are as stated in the opinion of Mr. Justice FRANKFURTER. But the due process clause of the Fourteenth Amendment is concerned with matters of substance. It cannot rightly be made the instrument of reform of the manners of state officials. And however reprehensible or even criminal the acts of state officials may be, in so far as the conduct of the trial is concerned, they do not infringe due process unless they result in the use against the accused of evidence which is coerced or known to the State to be fraudulent or perjured, or unless they otherwise deny to him the substance of a fair trial, which is due process. See *Lisenba* v. *California*, 314 U. S. 219, 235-238; *Buchalter* v. *New York*, 319 U. S. 427, and authorities cited.

Judged by these standards, we think that there was no denial of due process in submitting petitioner Malinski's confessions to the jury in the manner in which they were in fact submitted, and that there is no constitutional ground for setting aside the jury's verdict against him. We cannot say on this record that the jury was not rightly permitted to determine whether petitioner's confessions of guilt to the police were coerced, or that the verdict was without support in the evidence, or that the instruction that the jury could find the defendant guilty if it found that the second confession was not the result of the alleged coercion at the time of the first, was not properly given.

Petitioner Rudish has raised no substantial federal question reviewable here, and his conviction, as well as Malinski's, should be affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1944.

Morris Malinski and Sidney Rudish, Petitioners, *vs.* The People of the State of New York.	On Petition for Certiorari to the Court of Appeals of the State of New York.

[March 26, 1945.]

Mr. Justice Frankfurter.

It is also my view that the judgment as to Malinski calls for reversal, leaving the disposition of Rudish's conviction in the light of such reversal to the New York Court of Appeals.

Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, the Constitution left the domain of criminal justice to the States. The Constitution, including the Bill of Rights, placed no restriction upon the power of the States to consult solely their own notions of policy in formulating penal codes and in administering them, excepting only that they were forbidden to pass any "Bill of Attainder" or "ex post facto Law", Constitution of the United States, Art. I, § 10. This freedom of action remained with the States until 1868. The Fourteenth Amendment severely modified the situation. It did so not by changing the distribution of power as between the States and the central government. Criminal justice was not withdrawn from the States and made the business of federal lawmaking. The Fourteenth Amendment merely restricted the freedom theretofore possessed by the States in the making and the enforcement of their criminal laws.

Unlike the limitations of the Bill of Rights upon the use of criminal penalties by federal authority, the Fourteenth Amendment placed no specific restriction upon the administration of their criminal law by the States. Congress in proposing the Fourteenth Amendment and the States in ratifying it left to the States the freedom of action they had before that Amendment excepting only that after 1868 no State could "abridge the privileges or immunities of citizens of the United States" nor "deprive any person of life, liberty, or property, without due process of law".

nor deny to any person the "equal protection of the laws". These are all phrases of large generalities. But they are not generalities of unillumined vagueness; they are generalities circumscribed by history and appropriate to the largeness of the problems of government with which they were concerned. "The privileges or immunities of citizens of the United States" derived from the two aspects of citizenship in our federal system. The safeguards of "due process of law" and "the equal protection of the laws" summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people. The history of American freedom is, in no small measure, the history of procedure.

Here we are concerned with the requirement of "due process of law" in the enforcement of a state's criminal law. Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to this phrase. It expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society. The suggestion that "due process of law", as guaranteed by the Fourteenth Amendment, is a compendious expression of the original federal Bill of Rights (Amendments I to VIII) has been rejected by this Court again and again and after impressive consideration. See, *e. g.*, *Hurtado* v. *California*, 110 U. S. 516; *Twining* v. *New Jersey*, 211 U. S. 78; *Brown* v. *Mississippi*, 297 U. S. 278; *Palko* v. *Connecticut*, 302 U. S. 319.

In the Bill of Rights, Eighteenth-century statesmen formulated safeguards against the recurrence of well-defined historic grievances. Some of these safeguards, such as the right to trial by a jury of twelve and immunity from prosecution unless initiated by a grand jury, were built on experience of relative and limited validity. "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." *Palko* v. *Connecticut*, *supra*, at 325. Others, like the freedom of the press or the free exercise of religion or freedom from condemnation without a fair trial, express rights the denial of which is repugnant to the conscience of a free people. They express those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", *Hebert* v. *Louisiana*, 272 U. S. 312, 316, and are implied in the comprehensive concept of "due process of law".

The Due Process Clause of the Fourteenth Amendment thus has potency different from and independent of the specific provisions contained in the Bill of Rights. Apart from all other considerations, how could it be otherwise without charging Madison and his great contemporaries in the framing and adoption of the Bill of Rights with writing into it a meaningless clause? The Fifth Amendment specifically prohibits prosecution of an "infamous crime" except by indictment; it forbids double jeopardy and self-incrimination, as well as deprivation of "life, liberty, or property, without due process of law". Not to attribute to due process of law an independent function but to consider it a shorthand statement of other specific clauses in the same Amendment is to charge those who secured the adoption of this Amendment with meretricious redundancy by indifference to a phrase—"due process of law"—which was one of the great instruments in the very arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen. Of course the Due Process Clause of the Fourteenth Amendment has the same meaning. To suppose that "due process of law" meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.

A construction which gives due process no independent function but makes of it a summary of the specific provisions of the Bill of Rights would tear up by the roots much of the fabric of law in the several States. Thus, it would require all the States to prosecute serious crimes through the grand jury system long ago abandoned by many of them, see *Hurtado* v. *California*, *supra*, to try such crimes by a jury of twelve which some of the States have seen fit to modify or abandon, see *Maxwell* v. *Dow*, 176 U. S. 581, to enforce the privilege against self-incrimination with the technical requirements prevailing in the federal courts when States, consistently with fundamental notions of justice, have seen fit to make other arrangements, see *Twining* v. *New Jersey*, *supra*, and to have jury trials "in Suits at common law, where the value in controversy shall exceed twenty dollars", a requirement which this Court has held over and over again for more than a hundred years does not apply to proceedings in state courts, see *Livingston* v. *Moore*, 7 Pet. 469, 551; *Walker* v. *Sauvinet*, 92 U. S. 90; *Pearson* v. *Yewdall*, 95 U. S. 294, 296. And we can hardly select one provision of the Bill of Rights and reject another, as for instance the provision of the Fourth Amendment against unreasonable search and seizure. Such a view would not only disregard the